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Report of Working Group III (Online Dispute Resolution) on the work of its twenty-fifth session (New York, 21-25 May 2012)*

Contents

* The late submission of the document reflects the need to confirm details of insertion of additional text therein.

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I. Introduction

1. At its forty-third session, (New York, 21 June-9 July 2010), the Commission agreed that a Working Group should be established to undertake work in the field of online dispute resolution relating to cross-border electronic commerce transactions, including business-to-business (B2B) and business-to-consumer (B2C) transactions.[1] It was also agreed that the form of the legal standard to be prepared should be decided after further discussion of the topic.

2. At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission took note of a concern raised that, given that online dispute resolution was a somewhat novel subject for UNCITRAL and that it related at least in part to transactions involving consumers, the Working Group should adopt a prudent approach in its deliberations, bearing in mind the Commission's direction at its forty-third session that the Working Group's work should be carefully designed not to affect the rights of consumers.[2] Further, the view was expressed that the Working Group should bear in mind the need to conduct its work in the most efficient manner, which included prioritizing its tasks and reporting back with a realistic time frame for their completion.

3. At that session, the Commission reaffirmed the mandate of Working Group III relating to cross-border electronic transactions, including B2B and B2C transactions. The Commission decided that, while the Working Group should be free to interpret that mandate as covering consumer-to-consumer (C2C) transactions and to elaborate possible rules governing C2C relationships where necessary, it should be particularly mindful of the need not to displace consumer protection legislation. The Commission also decided that, in general terms, in the implementation of its mandate, the Working Group should also consider specifically the impact of its deliberations on consumer protection and that it should report to the Commission at its next session.

4. At its twenty-second session (Vienna, 13-17 December 2010), twenty-third session (New York, 23-27 May 2011) and twenty-fourth session (Vienna, 14-18 November 2011), the Working Group commenced its work on the preparation of legal standards on online dispute resolution for cross-border electronic transactions, in particular, procedural rules on online dispute resolution for cross-border electronic transactions.

5. The most recent compilation of historical references regarding the consideration by the Commission of works of the Working Group can be found in document A/CN.9/WG.III/WP.111, paragraphs 5-14.

II. Organization of the session

6. Working Group III (Online Dispute Resolution), which was composed of all States members of the Commission, held its twenty-fifth session in New York,

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[1] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 257.

[2] Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 256; and ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 215.

from 21 to 25 May 2012. The session was attended by representatives of the following States members of the Working Group: Austria, Benin, Brazil, Cameroon, Canada, Chile, China, Colombia, Czech Republic, Egypt, El Salvador, Germany, India, Israel, Japan, Kenya, Mexico, Nigeria, Philippines, Republic of Korea, Russian Federation, Senegal, Singapore, Spain, Thailand, United States of America and Venezuela (Bolivarian Republic of).

7. The session was also attended by observers from the following States: Croatia, Cuba, Finland, Indonesia, Iraq, Kuwait and Panama.

8. The session was also attended by observers from the Holy See.

9. The session was also attended by observers from the European Union.

10. The session was also attended by observers from the following international organizations:

(a) *United Nations System*: United Nations Economic Commission for Africa (UNECA);

(b) *International non-governmental organizations*: American Bar Association (ABA), Arab Association for International Arbitration (AAIA), Center for International Legal Education (CILE), Centre de Recherche en Droit Public (CRDP), Chartered Institute Of Arbitrators (CIARB), European Law Students' Association (ELSA), Forum for International Conciliation and Arbitration (FICACIC), Institute of Commercial Law (Penn State Dickinson School of Law), Institute of International Commercial Law (IICL), Instituto Latinoamericano de Comercio Electrónico (ILCE), Inter-American Commercial Arbitration Commission, Internet Bar Organization (IBO), National Center for Technology and Dispute Resolution (NCTDR), New York State Bar Association (NYSBA), Regional Centre for International Commercial Arbitration — Lagos (RCICA), Willem C. Vis International Commercial Arbitration Moot (MAA).

11. The Working Group elected the following officers:

Chairman: Mr. Soo-geun OH (Republic of Korea)

Rapporteur: Mr. Walid Nabil TAHA (Egypt)

12. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.III/WP.111);

(b) A note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: draft procedural rules (A/CN.9/WG.III/WP.112 and Add.1);

(c) A note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: issues for consideration in the conception of a global ODR framework (A/CN.9/WG.III/WP.113);

(d) A note submitted by the delegation of Canada on a proposal for the preparation of principles applicable to online dispute resolution providers and neutrals (A/CN.9/WG.III/WP.114); and

(e) A note submitted by the Center for International Legal Education (CILE) on analysis and Proposal for Incorporation of Substantive Principles for ODR Claims and Relief into Article 4 of the Draft Procedural Rules.

13. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Preparation of legal standards on online dispute resolution.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

14. The Working Group engaged in discussions on online dispute resolution for cross-border electronic transactions: draft procedural rules on the basis of documents A/CN.9/WG.III/WP.112 and Add.1, A/CN.9/WG.III/WP.113, A/CN.9/WG.III/WP.114 and A/CN.9/WG.III/WP.115. The deliberations and decisions of the Working Group on these topics are reflected below.

IV. Online dispute resolution for cross-border electronic transactions: draft procedural rules

A. General remarks

15. There was broad support for the proposition that the intent of the Rules was not to effect a change in domestic laws on a global scale, but to provide a practical avenue — which in practice did not exist at present — for the quick, simple and inexpensive resolution of low-value cross-border disputes, matters for which it was not generally practicable to bring an action in the courts. This in itself was said to be in general a benefit to consumers who, if the ODR system was fair and effective, would likely not use domestic courts for such cases. It was pointed out that courts often quash agreements to arbitrate which involve consumers for the reason that engaging in the specified arbitration would be costly and complex for the consumer, and thus a hardship; but a cheap, easy and fast system of dispute resolution would not attract such criticism.

16. It was agreed that the Rules being drafted were of a contractual nature, applied by agreement of the parties. The Rules were thus binding on the parties to the extent that domestic law allowed, and could not override mandatory law at the domestic level. There was also a general consensus that the Rules could not in effect prevent parties having access to the courts in those jurisdictions where such access was ensured by domestic law.

17. The Working Group took note of the ongoing work by the European Union, in particular, the proposed Directive on alternative dispute resolution for consumer

disputes and amending Regulation and the proposed Regulation on online dispute resolution for consumer disputes. However, it was pointed out that the aim of the Working Group was to craft a global system which could be suitable for use by all the regions.

B. Notes on draft procedural rules

1. Introductory rules (A/CN.9/WG.III/WP.112, preamble, draft articles 1-3)

Draft article 1 (Scope of application)

Paragraph (1)

18. At the outset, the Working Group recalled its previous deliberations on the issue of pre-dispute agreements involving consumers. In order to address different concerns previously raised, a proposal was made to word draft article 1, paragraph (1) as follows, which was said to be preferable to either of the draft options:

> *"(1) The Rules shall apply where the parties to a transaction conducted by use of electronic communications have agreed, through clear and adequate informed consent — either at the time of the transaction or after a dispute has arisen, and separately from the transaction — that disputes in relation to that transaction shall be submitted to online dispute resolution under the Rules."*

19. While there was broad agreement that the proposed paragraph reflected the divergent views and that it was a good starting basis for further deliberation, concerns were raised that it was not sufficient to address consumer protection under domestic legislation. It was also emphasized that the proposed paragraph would not sufficiently accommodate the concerns raised with respect to pre-dispute agreements to use ODR where a consumer was involved.

20. It was observed that, in making a claim pursuant to the Rules, a consumer could be said to be agreeing to their use on a "post-dispute" basis by the very making of the claim. Where a consumer was a respondent, its consent would have to be shown to the satisfaction of the neutral. It was pointed out that it was within the power of a neutral under the draft Rules to decide if a valid consent to the use of ODR existed in a particular case.

21. Concerns were raised about the use of the term "informed consent", which was more commonly used in medico-legal jurisprudence. A concern was raised that a party unsuccessful in ODR may attempt to re-litigate a case in a national court, on the basis that its consent to use ODR was not "informed". It was noted that informed consent is generally understood, in common law countries, to mean that a patient's consent to medical treatment has been obtained after he or she has been informed of the risks. However the intention of this paragraph of the Rules was to ensure that a party must clearly know that it is consenting to ODR when it enters into an online contract.

22. Views were advanced on the meaning of the term "informed consent", and in particular whether a party must be made expressly aware of what it is giving up by consenting to the use of the Rules (e.g. the right to a trial in a national court). It was suggested that it be made clear that an ODR award did not preclude the bringing of

a later action on a matter not covered by the Rules, such as bodily harm or consequential damages. It was further suggested that the term "informed consent" be replaced by other, more precise terminology.

23. One suggestion was to ensure that consent was both express and informed, the former meaning that a party understood that in agreeing to ODR it was concluding an agreement separate from the transaction in issue, the latter meaning that it understood the content and implications of that agreement. These were said to include the exclusion of recourse to the domestic legal system (but not for causes of actions which lay outside the Rules) and that the ODR result was final and binding and without appeal. Some doubts were expressed as to whether the meaning of the concepts of "express" and "informed" was clear enough to justify their inclusion in the Rules.

24. It was suggested that a better guarantee that the consumer was clearly informed would be to provide that the agreement to enter into ODR was an agreement separate from the transaction.

25. The Working Group deliberated whether to include examples of informed consent in the commentary to the Rules or to define it clearly in the Rules in view of enhancing legal certainty and to promote the better understanding on the part of business parties.

26. In consideration of the above concerns, a modified proposal was made to replace the proposed paragraph (1) with the following two paragraphs:

> *"(1) The Rules shall apply where the parties to a transaction conducted by use of electronic communications have, either at the time of the transaction or after a dispute has arisen, explicitly agreed that disputes relating to that transaction within the scope of the ODR Rules shall be submitted to ODR under the Rules.*
>
> *(1) bis. Explicit agreement referred to in paragraph (1) above requires agreement separate from that transaction and notice in plain language to the buyer that disputes relating to the transaction will be resolved through an ODR process under the ODR Rules."*

27. Subsequently, a suggestion was made to amend the second paragraph of that proposal by including the word "exclusively" so that it would read "will be exclusively resolved". It was also suggested to include the phrase "within the scope of the ODR Rules" after the second use of the word "transaction" in the second paragraph. There were several suggestions that the proposed wording not be placed in draft article 1 under "scope of application", but elsewhere in the Rules, for example in draft article 2 under "definitions". It was also urged that, while illustrating the provision with examples of acceptable arbitration clauses could be helpful, care should be taken that the examples not become regarded as a standard against which any form of consent under the Rules might be strictly judged in future.

28. After discussion, it was agreed to amend draft article 1 with the proposal as modified, taking into account the suggestions made in the paragraph above, which draft provision would then serve as basis for further consideration by the Working Group.

29. The Working Group considered a proposal to supplement draft article 1, as amended, by adding the following paragraph after paragraph (1) of the amended draft article 1:

> *"The Rules shall not apply where the law of the buyer's state of residence provides that agreements to submit a dispute within the scope of the ODR Rules are binding on the buyer only if they were made after the dispute has arisen and the buyer has not given such agreement after the dispute has arisen or confirmed such agreement which it had given at the time of the transaction."*

30. This was said to address the situation in those jurisdictions where pre-dispute agreements to arbitrate involving consumers were not binding upon consumers, in order to ensure that the ODR process went forward with a valid consent to its use by any involved consumer, and not in conflict with relevant national law. It was pointed out that such paragraph would also spare the parties engaging in arbitration proceedings when the resulting arbitral award was not enforceable in the consumer's state of habitual residence, because that state's law did not recognize pre-dispute arbitration agreements for consumers.

31. There were several expressions of support for such a provision; also, several concerns were expressed. These included the following observations: that since the Rules provide not only for arbitration but for negotiation and facilitated settlement as well, care should be taken not to render those aspects of the Rules inapplicable, particularly where the vast majority of cases are disposed of at the stages prior to arbitration; that to the extent the proposal purports to state a rule of substantive law its presence in a set of contractual rules may be problematic; that consideration could be given to re-casting the Rules as facilitated settlement rules rather than arbitration rules and thus avoiding the problem that the proposal is intended to address; and that the intended result might be achieved by using wording found in a note to Article 1 of the UNCITRAL Model Law on Electronic Commerce to the effect that its provisions are not intended to derogate from legal norms aimed at consumer protection.

32. Other concerns included: that rendering the Rules inapplicable would preclude one of their important functions, namely to determine whether there is in fact a valid arbitration agreement; that the proposal raised issues, such as residence of a consumer and the laws of its country, which required further consideration; that the wording of the proposal was too complex for a set of Rules intended to be simple and useable by non-lawyers; that there was no universal agreement that the residence of the consumer/buyer was the governing consideration with regard to enforceability of agreements to arbitrate; and that the concept of "habitual residence" could be difficult to apply in a global environment of electronic transactions.

33. One suggestion was to include in draft article 8 a provision requiring an additional "click" from a party whose participation was limited by restrictions on pre-dispute agreements, thus keeping an unaffected "business" party bound to the process throughout. In response, it was recalled that vendors might also be claimants, for example small and medium enterprises in developing countries, which might be at a disadvantage compared to sophisticated buyers in developed countries.

34. After discussion, it was concluded that the proposal would be retained in square brackets, that comments thereon would be reflected in the commentary, and the whole considered in a document to be discussed at a future meeting.

35. It was also stated that the effects on consumers of ODR proceedings, including the possibility of a binding award or decision being issued against a consumer (which may not be enforceable in its jurisdiction), would need to be considered.

36. The Working Group also engaged in discussion on a proposal to add a separate and additional paragraph to complement the modified paragraph (1) and (1) bis:

> *"These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail."*

37. It was suggested that that proposal, which was inspired by Article 1(3) of the UNCITRAL Arbitration Rules, should be modified to replace the word "arbitration" with "ODR proceedings", since the Rules encompass matters other than arbitration.

38. After discussion, it was decided to put the proposed paragraph in brackets for future deliberation by the Working Group.

Paragraph (2)

39. There was general agreement to retain the provision, striking the word "seller" and removing the square brackets from around "parties". Among other things, this was said to preserve the relevance of the Rules for situations other than "buyer-seller" disputes.

40. The Working Group recalled the principle of technological neutrality and noted that defining specific types of electronic address in the Rules would put the Rules at risk of being outdated in view of future technological advancements. In light of this, it was proposed that reference to different types of electronic addresses be included in the commentary to the Rules.

41. It was suggested to note in the commentary that parties should be required to reflect a current functioning electronic address in their contact information, to ensure that communications made pursuant to the Rules reached them as intended.

42. There were some suggestions to re-locate the provision to draft article 3 or possibly draft article 4, one view being that those articles already disposed of the question. It was mentioned that identification of the time frame for the parties to submit the contact information may be useful in determining the suitable location for the paragraph.

43. Concerns were raised as to what, if any, sanctions should exist for a party that provided false or misleading contact information, and whether such sanctions should be expressed in the Rules themselves or in other law.

44. After discussion, it was agreed to maintain the provision, choosing the term "parties" over "seller" and revisit the issue of its location in the Rules after consideration of draft articles 3 and 4.

Draft article 2 (Definitions)

45. The Working Group considered whether to retain the order of the definitions, which in the present draft were ordered alphabetically and numbered accordingly, causing a discrepancy in the numbering of the definitions in draft article 2 as amongst the different language versions.

46. There was general support for the idea that each language version should have the same order of definitions.

47. After discussion it was decided that the Secretariat should order the definitions in a logical manner which would be consistent in each language, which order will be considered by the Working Group at a future session.

Paragraph (1) "claimant"

48. There were no objections to retaining the current text.

Paragraph (2) "communication"

49. There were no objections to retaining the current text.

Paragraph (3) "electronic communication"

50. The Working Group recalled its decision to include in the definition of "electronic communication" elements of digitized communication (A/CN.9/739, para. 32).

51. After discussion, it was agreed to retain the current text.

Paragraph (4) "neutral"

52. The determination of whether to use the word "award" and / or "decision" was considered.

53. Two suggestions were proposed in relation to the phrase "*renders a [decision] [award] regarding the dispute*". The first was to replace this phrase with "*renders an award or other decision regarding the dispute*" (reflecting the language in Article 33(1) of the UNCITRAL Arbitration Rules); the second was to replace the same phrase with "*resolves the dispute*".

54. It was agreed that both options would be placed in square brackets and the final language would be adopted at a later stage, bearing in mind that the purpose of this provision was to define the role of the neutral and not the nature of any determination he or she might make.

Paragraph (5) "respondent"

55. There were no objections to retaining the current text.

Paragraph (6) "ODR"

56. It was agreed that the square bracketed phrases "*[system]*" and "*[through an information technology base platform and]*" would be deleted and the square brackets around the word "*[mechanism]*" removed.

Paragraph (7) "ODR platform"

57. It was agreed to remove the square brackets around the word "*[system]*".

Paragraph (8) "ODR provider"

58. The Working Group agreed to replace the existing draft paragraph with the following: *"'ODR provider' means an online dispute resolution provider which is an entity that administers ODR proceedings for the parties to resolve their disputes in accordance with the Rules, whether or not it maintains an ODR platform."*

59. It was proposed that a definition for the word "writing" be added to the list of definitions. The following language, drawing upon Article 6 of the UNCITRAL Model Law on Electronic Commerce, was suggested: *"Writing means a data message containing information that is accessible so as to be useable for subsequent reference."*

60. After discussion, it was agreed that this language would be placed in square brackets for future consideration.

Draft article 3 (Communications)

Paragraph (1)

61. The Working Group considered whether all communications should go through the ODR platform, regardless of whether the ODR platform was owned and/or operated by the ODR provider.

62. There was strong support for the proposition that all communications in the ODR process take place through the ODR platform, which was said to provide the technical expertise to best support ODR processes, including oversight by the ODR provider and ensuring the absence of bias in the procedures. The maintaining of records to enable access to case information by parties and the neutral was seen as crucial in ensuring transparency. It was also noted that the ODR platform plays a critical role in guarding against fraud — for example the risk that a bad actor might seek to impersonate an ODR provider — by furnishing a technology infrastructure to prevent and detect such efforts. Other concerns in support of this proposition included: ensuring data security; facilitating record availability and record maintenance; and tracking issues of timing.

63. Accordingly, it was agreed that paragraph (1) be replaced with the following: *"All communications in the course of ODR proceedings shall be submitted by electronic means via the ODR platform designated by the ODR provider."*

64. A suggestion was made, to consider at some future point, moving technical aspects, such as platform design and case flow matters, out of the Rules to a separate document in order to simplify the Rules, to make them more user-friendly and to accommodate ongoing developments in technology.

Paragraph (2)

65. The Working Group agreed to retain the paragraph, with square bracketed text to be considered at a future meeting.

Paragraph (3)

66. A proposal was made to replace paragraph (3) with the following text: *"The electronic address[es] for communication of the notice by the ODR provider to the respondent shall be the address[es] published by the respondent in a manner clearly and readily available to the public when accepting the Rules; or notified to the ODR provider when the parties have agreed to online dispute proceedings under the Rules, or, if the respondent has not yet agreed to such proceedings, the address[es] which have been provided by the claimant. Thereafter, the designated address[es] of the respondent for the purpose of all communications arising under the Rules shall be that [those] which the respondent notified to the ODR provider when accepting the Rules or any changes notified during the ODR proceeding."*

67. Concerns were expressed that that language was too complex for the ordinary user, and a preference was expressed for simpler language.

68. A further proposal was made to modify paragraphs (2) and (3) with wording indicating that the designated contact addresses should be those specified by the parties at the time the parties agreed to submit their dispute to ODR under the Rules, rather than those set out in the "notice". This proposal received support on the basis that it avoided the potentially confusing use of the term "notice" before it was formally defined in the Rules (which definition can be found in draft article 4) and furthermore encapsulated the principle that when parties accepted the Rules, the contact address used at that stage (as updated to the ODR provider from time to time), should be the address used.

69. A suggestion was made that it might be helpful to provide a definition of "notice" in article 2.

70. The Working Group identified a key policy issue relevant to this provision, (currently addressed in one form in the second sentence of paragraph 3), namely that where the respondent's address has changed in the period between the agreement to submit a dispute to ODR, and the time of a dispute arising in practice, but where such change has not been communicated to the ODR provider, the claimant may face a challenge in initiating a claim.

71. The Working Group requested that the Secretariat prepare draft language to reflect different options with regard to draft articles 3, paragraphs (2) and (3) for consideration at a future session.

Paragraph (4)

72. There was a suggestion to delete the words "*at the ODR platform*". There was a further suggestion to add, at the end of the paragraph (and irrespective of whether those words were deleted), the following words: "*provided that the addressee has been notified thereof*". It was agreed that both phrases would be placed in square brackets, to be considered at a further session.

73. The Working Group requested that the Secretariat prepare suggestions as to draft language for paragraph (4), bearing in mind the considerations raised in paragraph (6). It was further suggested that Article 2(5) of the UNCITRAL Arbitration Rules, with relevant modifications for use for ODR rather than for arbitration, be considered in any further drafting.

74. A concern was raised that in the event a party did not receive a communication from the provider, that the provider should make further efforts to contact that party by other means.

Paragraphs (5) and (6)

75. The Working Group agreed to consider the square bracketed text at a future meeting.

2. Commencement (A/CN.9/WG.III/WP.112, draft article 4)

Draft article 4 (Commencement)

76. Having heard the proposal to restructure draft article 4 and split it into two separate articles for purposes of clarity and simplicity, the Working Group agreed that the Rules would include a separate article on notice and another on response. In addition, the Working Group agreed to incorporate the contents of existing annexes by reflecting them as paragraphs in the respective articles.

77. It was further suggested to consider adding options as to the time of receipt of notice as discussed in paragraphs 32 and 33 of A/CN.9/WG.III/WP.112.

3. Negotiation (A/CN.9/WG.III/WP.112, draft article 5)

Draft article 5 (Negotiation)

Paragraph (1)

78. Noting that every encouragement should be given to parties to negotiate a settlement, the point was made that ODR providers should provide the technical means to parties to facilitate negotiations between them, and should do so even before the involvement of the neutral. It was stated that as contractual rules, the Rules cannot impose obligations on third parties such as the ODR provider. A caution was expressed that while the Rules should facilitate negotiation, they should not force the parties to negotiate at this stage.

79. The Working Group considered rewording paragraph (1) in order to more clearly define the negotiation stage. One suggestion was as follows: *"Upon receipt of the response referred to in article [--], the parties shall attempt in good faith to settle their dispute through direct negotiation including, where appropriate, through the communication methods available on the ODR platform."*

80. A further suggestion, in order to make clear that the Rules support implementation of negotiated settlements, was to reword paragraph (1) as follows: *"If settlement is reached, and subject to Article 5, paragraph (5), then the ODR proceeding is automatically terminated."*

81. The Working Group requested the Secretariat to draft a new paragraph (1), in light of these suggestions, and taking into account the types of assistance offered by existing ODR providers.

Paragraph (2)

82. Views differed as to which of the square bracketed options in paragraph (2) should be retained. It was decided that, pending further discussion on the design of

the ODR procedure, including the type and number of stages therein, that all options should remain in square brackets. It was also agreed to strike the square brackets around "*[ten (10)]*".

Paragraph (3)

83. It was agreed to delete the square bracketed text "*[five (5)]*" and retain "*[seven (7)]*" removing the square brackets in order to maintain consistency with draft article 4, paragraph (3). It was further agreed to remove the square brackets around the last bracketed phrase, "*[, at which point the ODR provider shall [promptly][without delay] proceed with the appointment of the neutral in accordance with article 6 below]*", but to retain the internal bracketed text "*[promptly][without delay]*" for further deliberation.

Paragraph (4)

84. The Working Group recalled its previous decision that limiting the time period during which an extension could be agreed between the parties would be preferable in order to keep low-value, high-volume cases proceeding efficiently and to encourage parties to resolve their disputes in a timely manner.

85. A query was raised in relation to the difference in practical terms between an extension "*[for the filing of the response]*" and "*[for reaching settlement]*". It was clarified that the two options were not mutually exclusive, and one or both could be used. There was consensus that only one of these phrases should be used, but different views were expressed as to whether the former or latter would be most effective in facilitating expeditious proceedings. Some views were expressed that the paragraph should govern only the commencement of proceedings, and hence be applicable only to a response, and other views were expressed that there should be some limitation on the capacity of the parties to negotiate through the ODR system (without prejudice to their ability to negotiate outside the ODR system in any event). It was agreed to leave both options in square brackets, to be discussed at a future session.

86. It was further agreed that the time limit for an extension in the paragraph should be "*[ten (10)]*" days, and the square brackets around this removed, and that the options of "*[five (5)]*" and "*[seven (7)]*" days should be deleted.

Paragraph (5)

87. It was recalled that the purpose of the paragraph was to allow a party to re-commence proceedings for the sole purpose of obtaining an award or decision with which it could seek enforcement.

88. Although it was acknowledged that a provision for the failure of a party to implement an agreed settlement should be included in the Rules, it was agreed that paragraph (5) as drafted was not adequate to fulfil this purpose.

89. A concern was expressed that this paragraph raised two important legal issues. Namely, a settlement agreement might need to include a separate provision providing for disputes arising out of that settlement, and that resolving a dispute arising out of settlement might not be achievable via the same ODR proceedings

giving rise to that settlement agreement. A second concern was expressed as to the legal feasibility of opening new proceedings to render an award on agreed terms.

90. After discussion, the Working Group requested the Secretariat to re-draft this paragraph, taking into account the following matters expressed by the Working Group: (i) the relationship between this paragraph and paragraph (1); (ii) that short time periods for implementation of settlement and/or re-commencement could encourage compliance on the part of a defaulting party; (iii) that the phrase "re-open" better captures the intent of the paragraph than "re-commence", as it would not require re-starting the ODR procedure from the beginning; (iv) the possibility for forum shopping between ODR providers if it was not made clear in the paragraph that the same ODR provider must be used; (v) the need to have settlements clearly recorded on the ODR platform. It was agreed that the options set out in this re-drafted paragraph should be placed in square brackets for discussion at a future session.

4. Neutral (A/CN.9/WG.III/WP.112/Add.1, draft articles 6-7)

Draft article 6 (Appointment of neutral)

Paragraph (1)

91. Having heard no comments, it was agreed that paragraph (1) would be retained in its current form.

Paragraph (2)

92. It was expressed that the neutral's duty of independence and impartiality was an ongoing one. The Working Group requested that the Secretariat modify the second paragraph to reflect this.

Paragraph (3)

93. It was recalled that the background to this paragraph was to ensure the appointment of the neutral at this stage was a simple, automatic process. However, it was agreed that the intention was not to limit any right of a party which might have a justified objection to his or her continued involvement. It was agreed that such a right could arise at any point during the ODR process.

94. The Working Group requested the Secretariat to draft a separate provision permitting a party to object to the appointment of a neutral at any stage of proceedings where there was a justification for such an objection.

95. With regard to the number of objections to which a party was entitled, and to the number of days within which objections may be made, there was some disagreement, and therefore the square bracketed text would remain, with the respective numbers to be discussed at a future session.

Paragraph (4)

96. It was pointed out that appointment of a neutral does not become final until after any challenge process has been completed pursuant to paragraph (3). The Working Group requested the Secretariat to revisit the paragraph to remove any ambiguity about when appointment becomes effective.

97. A concern was expressed that the first sentence appeared to preclude the application of the second sentence. The Working Group requested the Secretariat to redraft the paragraph to reflect the principle that within a three-day period the parties may object to the provision of information to the neutral, but that after the expiration of that three-day period and in the absence of any objections, the full set of information would be conveyed to the neutral.

98. It was suggested to add, at the end of the paragraph, the words "except in a situation to which Article 5(5) applies".

99. After discussion, it was agreed to remove brackets around "*[three (3) days]*".

Paragraph (5)

100. In order to provide the parties with the same rights to challenge a replacement neutral as they have with regard to the original neutral, the Working Group agreed that a provision mirroring paragraph (3) should be added to permit challenges to a replacement neutral, and that the language so added be placed in square brackets.

Paragraph (6)

101. There was consensus regarding the need for flexibility in the number of neutrals, in light of inter alia the evolving nature of ODR. It was agreed that the language of the current draft encompassed a certain degree of flexibility whilst retaining certainty, and should be retained, and the square brackets removed.

102. The Working Group agreed to remove square brackets from this paragraph.

103. In order to accommodate access to a wider range of neutrals, including neutrals from arbitral institutions, it was suggested that the Secretariat include the following draft language in square brackets for consideration at a future session (it was deemed that the best place for this language was at the end of the current paragraph (1)): "*[or belonging to other arbitral institutions]*".

Draft article 7 (Power of the neutral)

Paragraph (1)

104. It was agreed that this paragraph was more closely related to the appointment of the neutral and should be moved to draft article 6.

Paragraph (2)

105. It was considered that the paragraph contained two concepts — the function of the neutral, and principles of conduct to which the neutral is subject. It was agreed that these could be more clearly expressed as separate concepts, and repetition in the current draft reduced.

106. Consequently, the Working Group requested the Secretariat to re-phrase this paragraph and to include the re-phrased paragraph in square brackets for consideration at a future session.

107. The importance of maintaining the spirit of UNCITRAL texts was agreed; at the same time, the language could be modified where necessary to suit the needs of ODR.

Paragraph (3)

108. It was suggested that there might be some inconsistency between this paragraph and the ability of parties to object to the provision of documents generated during the negotiation stage to the neutral under draft article 6, paragraph (4). It was agreed that the following wording would be added to the beginning of the paragraph to resolve this inconsistency: "*Subject to any objections under article 6, paragraph (4)*".

Paragraph (4)

109. In relation to the non-square bracketed language, there was a suggestion to replace the phrase "may require" in the first sentence to "may request", in order to modify slightly the powers of the neutral.

110. In relation to the square bracketed language, there was wide consensus that the Rules should retain a provision on the principle of burden of proof. However, two primary concerns were addressed regarding the current language.

111. First, it was expressed that the current formulation did not reflect the varying concepts of burden of proof in consumer cases in different jurisdictions, and the unique circumstances surrounding the proof of facts in an online environment. It was agreed that the Working Group would discuss this paragraph at a future session in order to consider further the formulation of the concept of "burden of proof".

112. Second, it was agreed that the Secretariat find a new location for the square bracketed language, to reflect its importance as a substantive principle with legal consequences and obligations of the parties.

Paragraph (5)

113. A proposal was made to make the language of the paragraph more user-friendly by referring to the concept of "eligibility" when identifying the types of cases that the neutral may consider. In response, it was pointed out that adding the concept of eligibility could lead to ambiguity.

114. After discussion, it was agreed to retain the paragraph, which had already been the subject of Working Group discussions, as currently drafted.

Paragraph (6)

115. It was suggested that the paragraph should be modified to reflect the perceived need for a neutral to have the discretion to make enquiries or take necessary steps to determine whether receipt had taken place in respect of any communication from any party, rather than only in respect of the receipt of the notice by the respondent. Another suggestion was to make the obligation on the neutral a positive one, such that the neutral would be required to make enquiries where receipt of any communication was disputed.

116. The Working Group agreed that this paragraph should be modified to oblige the neutral to conduct enquiries where there was any doubt regarding whether the notice had been received, and to give the neutral the discretion to do so regarding all other communications. It was also suggested to bear in mind the situation of consumers who may not be able to check their electronic mails in a timely way.

117. The Working Group requested the Secretariat to draft language reflecting this agreement and to place such language in square brackets.

5. Facilitated settlement and arbitration (A/CN.9/WG.III/WP.112/Add.1, draft article 8)

Draft article 8 (Facilitated settlement)

Paragraph (1)

118. There was agreement that consumers were unlikely to undertake enforcement proceedings in a foreign country, and also that the Rules were intended to ensure that businesses comply with any outcomes reached.

119. The point was made that the intent was to devise an ODR system which would operate globally, taking into account the needs of developing countries and that final and binding decisions were required in order to secure the compliance of businesses with the outcomes. In that regard, the absence of a binding award would require consumers to, in effect, seek relief through the courts. The Working Group was reminded that there exists no international treaty providing for cross-border enforcement of court awards, underlining the importance of binding decisions under ODR. Consumers as well as small and medium enterprises in developing countries would, it was said, have no other avenues of redress in the absence of binding decisions.

120. It was suggested that private enforcement mechanisms could be effective in many instances, particularly at the early stages of ODR. It was suggested that all enforcement mechanisms depend for their effectiveness on a final and binding award, although other views were expressed to the effect that private enforcement mechanisms in the absence of a binding award could be effective, particularly where private enforcement mechanisms existed. It was also expressed that public and private enforcement mechanisms are not mutually exclusive and that without a mandatory outcome, the process would not be effective and its integrity could not be ensured.

121. It was clarified that the square bracketed language in this paragraph was intended to determine whether, after failure of facilitated settlement, the proceedings should automatically move to the final stage or whether the parties should have the option to move to the next stage.

122. The view was expressed that movement to the next stage should not be automatic if the final outcome could be a binding decision.

123. There was some support for the need for agreement or an additional requirement to move to the next stage, on the basis that the timing of such acceptance would amount to a post-dispute agreement to arbitrate.

124. One view was that even if an award against a consumer could be set aside, a consumer seeking to do so would suffer hardship, including incurring costs that it would be unable to recover. A contrary view was expressed to the effect that there is little risk to a consumer of being affected by an invalid award against him.

125. A concern was raised regarding the word “evaluate”, as to whether, at this stage of the proceedings that was the neutral’s function; if not, then another word might be considered.

126. It was recalled that this paragraph is closely related to the question in draft article 1 regarding the staged nature of ODR proceedings.

127. A further question was raised as to whether, where an agreement was made and not implemented, similar language to that proposed in relation to article 5(5) ("re-commencement" in the event of non-implementation of settlement) might be added to this paragraph, to permit the re-opening of proceedings in such circumstances. In response, it was suggested a solution might be to include in the annex an option for "non-payment of settlement" as a cause of action.

128. The Working Group agreed that ODR is a process involving three stages, and that the stage of decision by a neutral is part of that process. The Working Group noted that it has not yet been decided how to move from the second to the third stage or in fact whether the second and third stages might be compressed into a single phase.

129. It was further recalled that the vast majority of low-value, high-volume cases settle at the negotiation or facilitated settlement stage.

130. It was reiterated that these Rules are contractual rules and are not intended to override consumer law at the national level.

V. Consideration of the impact of the Working Group's deliberation on consumer protection; reporting to the Commission

131. The Working Group recalled the request by the Commission at its forty-fourth session that "in general terms, in the implementation of its mandate, the Working Group should also consider specifically the impact of its deliberations on consumer protection and that it should report to the Commission at its next session."[3]

132. The Working Group recalled its deliberations in previous Working Group sessions on the subject of consumer protection as summarized in paragraphs 15 and 16 of A/CN.9/WG.III/WP.113 and expressed the following considerations:

(a) That ODR would have an impact on consumers not only as claimants but potentially as respondents as well;

(b) That the Working Group has, throughout its deliberations, been very mindful of consumer protection issues and has been working hard to examine various options to accommodate consumer protection; and

(c) That consumer protection is not merely a local but a regional and international issue, in which ODR can play a positive role by promoting interaction and economic growth within regions, including among post-conflict countries and in developing countries.

VI. Future work

133. The Working Group noted that its twenty-sixth session was scheduled to take place in Vienna from 10-14 December 2012.

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[3] *Official Records of the General Assembly, Sixty-sixth session, Supplement No. 17* (A/66/17), para. 218.